No. 89-1787

In The

Supreme Court of the United States

October Term, 1989

NEBRASKA PUBLIC POWER DISTRICT,

Petitioner,

vs.

NUCOR CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court and the Court of Appeals were without subject matter jurisdiction over this intrastate retail electric rate case by reason of 28 U.S.C. § 1342 (Johnson Act of 1934), and, in particular, whether the Courts misconstrued the Act's provisions and erred as a matter of law in concluding that federal court jurisdiction existed based on findings:

> (a) That Nebraska Public Power District (NPPD) deprived Nucor Corporation of procedural due process because public meeting notices published by NPPD did not have "a reasonable certainty of resulting in actual notice" to Nucor;
>
> (b) That NPPD's adjustments to the intrastate retail electric rates charged to Nucor "could potentially interfere" with interstate commerce; and
>
> (c) That Nebraska state courts do not provide an adequate remedy to electric ratepayers in most cases because they require any rate adjustments and refunds to be made by the public power districts instead of by the courts.

2. Whether the judgment entered by the District Court and affirmed by the Court of Appeals, which awards $4,403,546.70 in damages to Nucor as a refund for allegedly unfair, unreasonable, and discriminatory electric rates charged by NPPD, a political subdivision of the State of Nebraska, is in excess of the Courts' jurisdiction, is contrary to law and not supported by the evidence, and is a usurpation of the legislative ratemaking power which the Nebraska Legislature by statute has vested in the Board of Directors of NPPD.

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REPORT OF OPINION

The opinion of a three-judge panel of the United States Court of Appeals for the Eighth Circuit is reported as *Nucor Corporation v. Nebraska Public Power District*, 891 F.2d 1343 (8th Cir. 1989).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 13, 1989. NPPD's timely petition for rehearing was denied on March 16, 1990. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The question of federal court subject matter jurisdiction in this case arises under the Johnson Act of 1934, 28 U.S.C. § 1342, which provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

Pertinent to a determination of NPPD's compliance with the third criterion of the Johnson Act is Neb. Rev. Stat. § 84-1411 (Reissue 1987), which provides in part:

> (1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice

> shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice, or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. . . .
>
> (2) The secretary or other designee of each public body shall maintain a list of the news media requesting notification of meetings and shall make reasonable efforts to provide advance notification to them of the time and place of each meeting and the subjects to be discussed at that meeting.

The question of the validity of the money judgment entered against NPPD is determinable with reference to Neb. Rev. Stat. § 70-655 (Reissue 1986), which provides:

> The board of directors of any district organized under or subject to Chapter 70, article 6, shall have the power and be authorized to fix, establish, and collect adequate rates, tolls, rents, and other charges, for electrical energy, water service, water storage, and for any and all other commodities, including ethanol, services, or facilities sold, furnished, or supplied by the district, which rates, tolls, rents, and charges shall be fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district the benefits of a successful and profitable operation and conduct of the business of the district.

STATEMENT OF THE CASE

This is an action for damages and injunctive relief brought by a large industrial retail electric customer, Nucor Corporation, a Delaware corporation, against a public corporation and political subdivision of the State of Nebraska, the Nebraska Public Power District (NPPD).[1] Jurisdiction of the

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[1] Nebraska Public Power District has no parent or subsidiary corporations.

United States District Court for the District of Nebraska was invoked by Nucor solely on the basis of diversity of citizenship under 28 U.S.C. § 1332.

The primary issue tried in the case was whether the electric rates that were charged to Nucor by NPPD during the years 1974 through 1986 were "fair, reasonable, and nondiscriminatory," as required by the Nebraska ratesetting statute, Neb. Rev. Stat. § 70-655 (Reissue 1986), and as provided in the service contract between the parties. Issues raised by NPPD, in its appeal from a $4.4 million judgment entered in favor of Nucor, concern the jurisdiction of federal district courts under the Johnson Act to make such a determination regarding an intrastate retail electric rate, the propriety of submitting this rate case to a jury as a breach of contract action, and the authority of the District Court to engage in judicial ratemaking by ordering the payment of damages to Nucor. NPPD submits that the issue of whether its rates satisfy the requirements of Nebraska statute must be determined in the state court system of Nebraska, in an action which is equitable in nature, and that to the extent Nucor is found entitled to rate relief, the only proper remedy under Nebraska law is an order which directs NPPD to reset Nucor's rates to correct any specific defects found by the court, and then to refund or credit any overcharges which result from the application of the corrected rates.

As authorized by Nebraska statutes, NPPD provides wholesale and retail electric service throughout Nebraska, and it owns and operates electric generation, transmission, and distribution facilities for this purpose. The governing body of NPPD, the Board of Directors, consists of 11 members who are popularly elected from districts across the State. Among the Board's responsibilities, as provided in Neb. Rev. Stat. § 70-655 (Reissue 1986), is the power and duty to "fix, establish, and collect adequate rates . . . for electrical energy . . . supplied by the district, which rates shall be fair, reasonable, nondiscriminatory . . . ."

NPPD and all other public power districts in Nebraska are subject to the plenary control of the Nebraska Legislature. Neither the Nebraska Public Service Commission nor any

other state administrative agency has any jurisdiction over the rates established by the boards of directors of the public power districts. However, decisions of the Nebraska Supreme Court establish the right of ratepayers, and of public power districts, to maintain actions for judicial review of rates set under authority of Section 70-655, and to obtain a declaration of whether the established rates are fair, reasonable, and nondiscriminatory as required by the statute. See *York County Rural Public Power District v. O'Connor*, 172 Neb. 602, 111 N.W.2d 376 (1961); *McGinley v. Wheat Belt Public Power District*, 214 Neb. 178, 332 N.W.2d 915 (1983).

In its 1985 complaint, Nucor alleged that since 1973 NPPD had violated Section 70-655, and that it had breached a "rate review" provision of the Nucor service contract by charging unfair, unreasonable, and discriminatory rates for electric service provided to a Nucor steel mill located near Norfolk, Nebraska. The steel mill, which utilizes electric arc furnaces to melt scrap metal, takes electric service directly from NPPD's high voltage facilities at a substation constructed by NPPD adjacent to the mill. The NPPD rate schedule applicable to such service, designated as "HTS-2," is available to any industrial or manufacturing customer that meets minimum demand requirements and takes service directly from high voltage facilities, but to date Nucor is the only NPPD customer to qualify for such rate.

Electric service to the Nucor steel mill began in September, 1973. Prior thereto, the parties entered into a service contract which incorporated the HTS-2 Rate Schedule and which provided that NPPD would supply all of Nucor's electrical requirements at the Norfolk mill for a period of 25 years. The contract also contains the following "rate review" provision:

> NPPD shall design large industrial primary rates payable under this Agreement in accordance with this Agreement and which rates shall be sufficient, but only sufficient, to collect the expense and estimated net revenue requirements associated with Large Industrial Primary Power Service and these

> rates shall be fair, reasonable and nondiscriminatory. During 1973 and thereafter at intervals not to exceed two (2) years NPPD shall prepare a study of the operating expenses and the estimated net revenue requirements for NPPD's Large Industrial Primary Power Service. The results of this study will provide the basis upon which the rates payable hereunder will be determined by NPPD based upon projected operating expenses and estimated net revenue requirements. The foregoing provisions for review of experienced net revenues and the estimated net revenue requirements and for the determination and adjustment of rates and charges shall not be construed to deprive the parties hereto of any rights or remedies, legal or equitable, which might otherwise be available pursuant to this Agreement.

Comparable language is contained in all service contracts between NPPD and its wholesale customers, which also take service from NPPD's high voltage facilities, and which represent about three-fourths of NPPD's total sales. In accordance with such "rate review" provisions, NPPD performs a cost analysis every two years for the purpose of reviewing and adjusting the wholesale rate schedule, designated as "R-2." Because the HTS-2 Rate applies to electric service that is taken at the same delivery point as for NPPD's wholesale customers, the HTS-2 Rate is designed to recover only an amount equal to the wholesale power service cost, determined with reference to the R-2 Rate Schedule, plus an amount for customer billing and accounting costs and for certain costs attributable to special equipment that is needed by NPPD to compensate for voltage fluctuations and other electrical disturbances caused by Nucor's arc furnace operation.

The method used by NPPD to establish the demand charges contained in the R-2 Rate and in the HTS-2 Rate is known as a "twelve-month noncoincident peak" or "12NCP" method. Such designation refers to the fact that this ratesetting method allocates costs based upon the sum of the customers' estimated demand billing units as measured at the time of each customer's peak usage (i.e., the measured demand is "noncoincident" to the system peak), for all twelve billing

periods during the year. Nucor's challenge to NPPD's use of such 12NCP methodology is the central issue in the lawsuit, as Nucor contends that NPPD should instead use a "four-month coincident peak" or "4CP" ratesetting method. Under the 4CP method advocated by Nucor, NPPD's demand costs would be allocated among its various wholesale and retail customer classes based upon the total kilowatt demand of each customer class as measured at the hour of the system peak demand (i.e., "coincident" to the system peak) and only during four months of the year – June, July, August, and September. The 4CP method results in a rate that is more favorable to Nucor by shifting costs to NPPD customers that have increased summer demands.

The rates charged to Nucor during the period in question were fixed by the NPPD Board of Directors by the adoption of a total of eleven retail rate resolutions during open session at regular meetings of the Board. Nine of these resolutions made adjustments to all of the retail rate schedules that apply to NPPD's more than 100,000 retail customers.[2] The other two resolutions affected only the HTS-2 Rate Schedule applicable to Nucor, but were the result of negotiations with Nucor.[3]

Legal notices for each of these Board meetings were published approximately one week in advance of the meetings in the *Columbus Telegram*, the principal newspaper published in Columbus, Nebraska, which is the location of NPPD's General Office and the site of its Board of Directors meetings. Advance notice of each meeting was provided to members of

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[2] Such resolutions were adopted by the Board on the following dates: November 21, 1974; October 30, 1975; November 18, 1977; October 31, 1978; November 15, 1979; November 20, 1980; November 19, 1981; November 19, 1982; and November 17, 1983.

[3] Resolution No. 72-84, adopted on July 21, 1972, approved the initial HTS-2 Rate Schedule that had already been incorporated into the service contract as signed by the parties on July 13, 1972; and Resolution No. 79-92, adopted on August 1, 1979, decreased the demand and energy charges in the HTS-2 Rate as the result of an amendment to Nucor's service contract that was executed by the parties on May 24, 1979.

the news media, and, as provided in the published notices, the agenda for each meeting was kept available for public inspection at the NPPD General Office. The content of the published notices was in accordance with provisions of the Nebraska public meetings law, Neb. Rev. Stat. § 84-1411(1) (Reissue 1987), and the publication was accomplished in accordance with the procedure designated by the NPPD Board of Directors and recorded in its minutes.

Course of Proceedings in the District Court

Trial to a jury commenced on April 6, 1987. During the trial, extensive testimony was presented by Nucor's expert witnesses, over NPPD's objections, that NPPD should use a "four-month coincident peak" (or "4CP") methodology to set rates. A study prepared by one of Nucor's experts which computed damages based on his application of a 4CP methodology was also received into evidence over NPPD's objections. Total damages claimed by Nucor based on the 4CP cost allocation study were $15,744,844.00. No other evidence of damages was presented by Nucor.

Over NPPD's objections that ratesetting by public power districts in Nebraska is controlled by Neb. Rev. Stat. § 70-655 (Reissue 1986), the case was submitted to the jury as a breach of contract action, with the District Court reserving ruling on NPPD's motion for directed verdict. The jury returned its verdict on May 6, 1987, finding that the rates established by NPPD for each of the years 1974 through 1986 were not fair, reasonable and nondiscriminatory. The total damages found by the jury to have been proximately caused by NPPD's failure to set fair, reasonable and nondiscriminatory rates for Nucor were $7,492,340.00.

The District Court entered judgment on May 15, 1987. (See App. 45.) Applying the five-year statute of limitations applicable to written contracts, the Court awarded damages for the years 1981 through 1986 in the amounts shown in the jury verdict for those years, and it prorated the 1980 damage figure to $244,136.70. Total damages awarded by the Court in the judgment were $4,403,546.70. In its memorandum and

judgment, the District Court also overruled NPPD's motion for directed verdict.

Following the denial of its motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial, NPPD timely filed its notice of appeal to the United States Court of Appeals for the Eighth Circuit on July 14, 1987. Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291.

Course of Proceedings on Appeal

In its brief submitted on appeal, NPPD contended that the judgment is contrary to Nebraska law and that it interferes with the legislative ratemaking power which is exercised by NPPD and other public power districts in Nebraska under authority of Neb. Rev. Stat. § 70-655 (Reissue 1986); that this statutory rate action was erroneously submitted to the jury as a breach of contract action, and the jury was erroneously permitted to construe the contract; that the jury was improperly allowed to consider opinion testimony and legal conclusions offered by Nucor's experts as to the meaning of the "fair, reasonable, and nondiscriminatory" requirement; that Nucor's proof of damages based on application of a 4CP rate methodology was improper, and the District Court's reception of such evidence was inconsistent with its instruction to the jury that under Nebraska law, NPPD was not required to use any particular methodology in arriving at the rates it charged Nucor; and that, in any event, the jury verdict is not supported by such evidence, but is the product of speculation and conjecture on the part of the jury. In addition to these issues raised in its brief, NPPD, on March 22, 1988, filed with the Court of Appeals a suggestion of lack of jurisdiction and a motion to remand to the District Court with directions to vacate the judgment and to dismiss the action based on the applicability of the Johnson Act of 1934, 28 U.S.C. § 1342.

Following additional briefing as to the jurisdictional issue, oral argument was had before a three-judge panel of the Court of Appeals on June 15, 1988. On June 30, 1988, an order was entered remanding the case for the purpose of

allowing the District Court to address the question in the first instance of whether federal courts have subject matter jurisdiction over this action, based upon the record and such additional evidence as the District Court deemed necessary, and requesting the District Court to certify its findings and conclusions on this issue to the Court of Appeals. In its order, the Court of Appeals further stated that it retained jurisdiction of the appeal pending remand. (App. 28.) Pursuant to the order of remand, the District Court held a hearing on the jurisdictional issue on September 29-30, 1988.

Disposition of the Jurisdictional Issue

On December 6, 1988, the District Court entered a memorandum and order finding "that federal jurisdiction is not precluded by the Johnson Act," and it certified such finding to the Court of Appeals. (App. 42.) Following additional briefing, the appeal was argued to a second three-judge panel of the Court of Appeals on May 12, 1989. The Court of Appeals affirmed the District Court's finding in its opinion of December 13, 1989, holding that "[w]e conclude that the district court did not err in determining that the Johnson Act did not deprive it of jurisdiction to consider the merits of the case." (App. 12; 891 F.2d at 1348.)

As an initial matter, both Courts expressed "serious reservations" about the applicability of the Johnson Act to cases such as this one, where rates established by a publicly-owned utility are not regulated by an independent state agency. The District Court stated that the case "presents a unique situation" because of NPPD's status as a self-regulating utility, and that "[t]he Johnson Act envisions independent regulation." (App. 35.) The Court of Appeals, while noting NPPD's evidence that only about one-third (702 out of 2,096) of the publicly-owned electric utilities in the United States are subject to regulation by state agencies,[4] stated that such evidence

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[4] NPPD's Exhibit 704A, the *1986 Annual Report on Utility and Carrier Regulation* of the National Association of Regulatory Utility

(Continued on following page)

"does not shed light on the intent of Congress in passing the Johnson Act," and that "the primary thrust of the Act is to prevent public utilities from having access to a federal forum to redetermine rates previously reviewed by a state regulatory commission." (App. 7-8, n. 4; 891 F.2d at 1346-47, n. 4.)

However, neither the District Court nor the Court of Appeals found it necessary to resolve the issue of the applicability of the Johnson Act to NPPD, as they instead held that one or more of the four criteria of the Act were not satisfied in this case. Their specific findings regarding each of the criteria were as follows:

(1) Diversity Jurisdiction.

The District Court found there was no dispute that Nucor's federal court action was based solely on diversity of citizenship, and the Court of Appeals agreed. (App. 6, 37; 891 F.2d at 1346.) This is the only criterion of the Johnson Act that both courts found to be satisfied.

(2) No Interference With Interstate Commerce.

Although observing that "[t]he parties have not addressed this issue," and that "[t]he significance of the interstate contacts and effects in this case is unclear," the District Court stated that "[t]he orders at issue here may well interfere with interstate commerce." (App. 37.) Factors cited by the District Court in support of such statement were that "power sold to Nucor by NPPD was generated in other states (WAPA Power)," that "the products manufactured and sold by Nucor are distributed in other states," and that "Nucor's corporate headquarters are also located in another state." (App. 37.) The

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Commissioners, further disclosed that the retail rates of publicly-owned electric utilities (which outnumber privately-owned electric utilities by 2,096 to 311) are subject to agency regulation, in whole or in part, in only 19 states, and that the wholesale rates of such utilities are subject to some form of agency regulation in only 13 states.

District Court concluded by stating that "[t]he record in this case, however, does not support a finding that the orders at issue do not interfere with interstate commerce." (App. 37.)

The Court of Appeals' opinion states that the District Court "concluded that the order could potentially interfere with interstate commerce." (App. 6; 891 F.2d at 1346.) While commenting that it recognized "the tentative nature of the [district] court's comments," the Court of Appeals held that "the court did not err in assessing the impact on interstate commerce," and that "the district court correctly determined that . . . [this] criterion is not met here either." (App. 11-12; 891 F.2d at 1348.)

(3) Reasonable Notice and Hearing.

In construing the "reasonable notice and hearing" requirement of the Johnson Act, the District Court determined that "[t]he Act apparently contemplates actual notice and hearing." (App. 38.) The Court also examined the provisions of Neb. Rev. Stat. § 84-1411 (Reissue 1987) of the Nebraska public meetings law, which requires "reasonable advance publicized notice" of public meetings, and it concluded that "under either a due process test or the Nebraska [public meetings] statute, NPPD did not provide reasonable notice in this case." (App. 39.)

In reaching this conclusion, the Court applied a procedural due process test that was used by the Nebraska Supreme Court in a case involving the adequacy of service of process to support a judgment, *Gruenewald v. Waara*, 229 Neb. 619, 624, 428 N.W.2d 210, 214-15 (1988) (adopting Restatement (Second) of Judgments § 2(1)(b) (1982)), in which it was stated that "notice can be considered adequate only if it is transmitted in a manner which, at a minimum 'has a reasonable certainty of resulting' in actual notice." (App. 39.) The Court of Appeals affirmed, holding that "[t]he evidence fully supports the district court's finding that the notice given Nucor did not have a reasonable certainty of giving Nucor actual notice." (App. 11; 891 F.2d at 1348.)

(4) Plain, Speedy and Efficient State Court Remedy.

As was the case with its treatment of the interstate commerce criterion, the District Court did not make a direct finding on this issue, but instead it stated that "[t]he Court cannot state that this requirement has been met." (App. 42.) The Court explained that "[a]ctions by Boards of Directors of Public Power Districts are subject to judicial review but ratepayers have an inadequate remedy in that actions must be remanded to the Board of Directors for rate setting in most cases. *See, e.g., McGinley v. Wheatbelt* [sic] *Public Power District*, 214 Neb. at 189, 332 N.W.2d at 921-22." (App. 42.) The Court of Appeals, while mentioning the District Court's finding in its opinion, does not expressly rely upon this criterion in holding that the District Court had subject matter jurisdiction in this case.

Disposition of Appeal on the Merits

In its opinion of December 13, 1989, the three-judge panel of the Court of Appeals, with one judge dissenting, affirmed the judgment of the District Court. The majority opinion holds that the case was properly framed as a breach of contract action, and that "the jury . . . could properly determine the amount of past overcharges." (App. 15-16, n. 5; 891 F.2d at 1350, n. 5.)

The dissenting opinion filed by Judge Heaney concludes that "it was error for the District Court to submit the question of damages to the jury," and that "[d]amages are too speculative." (App. 21; 891 F.2d at 1352.) Such opinion cogently states NPPD's position on appeal[5] regarding the damage award that was entered by the District Court and affirmed by the Court of Appeals:

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[5] NPPD does not accept, however, Judge Heaney's findings in concurrence with the majority opinion that the District Court had subject matter jurisdiction over this matter or that "the Power District may have breached its duty to charge fair, reasonable and nondiscriminatory rates." (App. 21; 891 F.2d at 1352.)

> This Court lacks both the wherewithal and the legislative authority to determine damages in this instance because more than one fair, reasonable and nondiscriminatory rate schedule may exist. Courts do not have the expertise or resources necessary to determine proper rate schedules or to permit an integrated approach to rate regulation. Moreover, the power of a Nebraska court is limited to determining only whether the rate schedule in question is fair, reasonable and nondiscriminatory. See, *e.g.*, *McGinley v. Wheat Belt Public Power District*, 332 N.W.2d 915 (Neb. 1983). . . .
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> *See also, Metropolitan Utilities Dist. v. City of Omaha*, 107 N.W.2d 397 (Neb. 1961) ("It would appear there are several formulas, under approved accounting methods, by which the board of directors of the [sewage] district could determine the cost. . . .However, it should be remembered that it is not for the city or the courts to determine what the formula is to be, but it is a matter for the board of directors of the district to decide. . . ."). Thus, I am unwilling to accept, as the majority appears to have done, that Nucor's cost allocation methodology is the only fair, reasonable and nondiscriminatory method.
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> The remedy of damages is not supported by Nebraska case law. *McGinley v. Wheat Belt Public Power District*, 332 N.W.2d 915 (Neb. 1983); *York County Rural Public Power District v. O'Connor*, 111 N.W. 2d 376 (Neb. 1961).

(App. 21-22; 891 F.2d at 1352.)

ARGUMENT

1. Certiorari should be granted to construe the provisions of the Johnson Act, 28 U.S.C. § 1342, in order to resolve important questions concerning the jurisdiction of the federal courts and affecting state regulation of intrastate utility rates.

This case presents important questions of law concerning the jurisdiction of federal district courts under 28 U.S.C.

§ 1342 which should be settled by this Court. "[I]t is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded." *Sumner v. Mata*, 449 U.S. 539, 547-48, n. 2, 101 S.Ct. 764, 769, n. 2, 66 L.Ed.2d 722, (1981) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed.2d 126 (1908)).

The purpose of the Johnson Act is "to foreclose federal court interference with state control over intrastate utility rates." *Hanna Mining Co. v. Minnesota Power & Light Co.*, 739 F.2d 1368, 1369 (8th Cir. 1984). "[T]he Congressional debate makes clear that the aim of Congress was to remove completely the subject of utility rates from the federal courts." *Miller v. NYS Public Service Commission*, 807 F.2d 28, 32 (2nd Cir. 1986). Thus, "[t]he Act is to be broadly applied to keep challenges to orders affecting rates out of the federal courts." *Hanna Mining v. Minnesota Power & Light Co., supra*, 739 F.2d, at 1370. As further stated in *Tennyson v. Gas Service Co.*, 506 F.2d 1135, 1137-38 (10th Cir. 1974):

> The evil sought to be remedied by the Johnson Act was the federal courts' interference with the states' own control of their public utility rates. . . .
>
> . . . [B]y its broad wording it is clear that [the Act] was intended to keep constitutional challenges to orders affecting rates out of the federal courts "lock, stock and barrel," or, as Professor Moore succinctly puts it, to effect a "general hands-off policy relative to state rate making." (1A J. Moore, Federal Practice ¶ 0.206, at 2282 (1974).)

The language of the Johnson Act, which defines and limits the jurisdiction of the federal district courts, "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." See *Christianson v. Colt Industries Operating Corp.*, ___ U.S. ___, 108 S.Ct. 2166, 2173, n. 2, 100 L.Ed.2d 811 (1988) (quoting *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8, 103 S.Ct.

2841, 2846, 77 L.Ed.2d 420 (1983)).[6] For example, what degree of "interference" with interstate commerce will justify federal court interference with intrastate retail electric rates? What is the measure of "reasonable" notice and hearing under the Act, and what is the relationship of this criterion to state and federal due process requirements and to state statutes which govern public notices? What constitutes a "plain, speedy and efficient" state court remedy? These and other important issues, which have not been passed upon by this Court, justify the further review of this case on writ of certiorari.[7]

This Court has, in fact, granted certiorari in numerous cases for the stated purpose of reviewing federal court jurisdiction, particularly when the issues presented impact federal-state relations. Because of the importance of the issues involved in such cases, certiorari has been granted without regard to whether a conflict exists among the federal circuits concerning the proper construction of the jurisdictional statute. See, *e.g.*, *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 350, 81 S.Ct. 1570, 1572, 6 L.Ed.2d 890 (1961) (certiorari granted "to decide the important jurisdictional questions raised under the 1958 amendment [to 28 U.S.C. § 1332]"); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 284, 90 S.Ct. 1739, 1742, 26 L.Ed.2d 234 (1970) (certiorari granted "to consider the validity of the federal court's injunction against the state court" under the provisions of the federal anti-injunction statute, 28 U.S.C. § 2283); *Amalgamated Clothing Workers of*

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[6] In *Christianson*, this Court granted certiorari to construe the provisions of 28 U.S.C. § 1338, noting that "[D]eterminations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Id.* (quoting *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 810, 106 S.Ct. 3229, 3233, 92 L.Ed.2d 650 (1986)).

[7] See Supreme Court Rule 10.1(c), which states that certiorari may be granted when "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court."

America v. Richman Brothers, 348 U.S. 511, 513, 75 S.Ct. 452, 454, 99 L.Ed. 600 (1955) (certiorari granted to construe 28 U.S.C. § 2283 because "[t]he jurisdictional question is plainly important in this area of federal-state relations"); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 8, 71 S.Ct. 534, 537, 95 L.Ed. 702 (1951) (certiorari granted to construe provisions for removal of actions to federal court under 28 U.S.C. § 1441 "[a]s prompt, economical and sound judicial administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts"). See also *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959); *State of California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 142 (1957); *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d 1246 (1957); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961).

With specific reference to cases involving public utilities, which by their very nature involve questions of public interest, this Court has also granted certiorari for the stated purpose of determining important questions regarding the jurisdiction of federal courts, see, *e.g.*, *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 80 S.Ct. 1122, 4 L.Ed.2d 1208 (1960); *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 96 S.Ct. 579, 46 L.Ed.2d 533 (1976); *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142 (1962); *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 75 S.Ct. 467, 99 L.Ed.2d 538 (1955); *Interstate Commerce Commission v. Atlantic Coast Line Railroad Co.*, 383 U.S. 576, 86 S.Ct. 1000, 16 L.Ed.2d 109 (1966); or important questions regarding federal and state relations, see, *e.g.*, *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964); *Federal Power Commission v. State of Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed.2d 1215 (1955);

United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 85 S.Ct. 1517, 14 L.Ed.2d 466 (1965).

The interest of the states in the regulation of public utilities has frequently been noted by this Court and other federal courts. As stated recently, for example, in *Carr v. The Southern Company*, 731 F.Supp. 1067, 1071 (S.D.Ga. 1990):

> [I]t is difficult to think of a greater local concern than a state's regulation of a public utility's retail sale of intrastate electricity. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the states." *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Com.*, 461 U.S. 375, 377, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1 (1983).

A similar statement is found in *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1387, 1398 (E.D.N.Y. 1989):

> State regulation of utilities is a matter of "substantial public concern." State interests in this area are enormous. See, *e.g.*, *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1 (1983) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the States."); *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 521, 68 S.Ct. 190, 197, 92 L.Ed.2d 128 (1947) (the states have a "vital interest[] in the regulation of rates and service" where utilities are concerned).

Because of the important public interests involved, it is appropriate for this Court to grant certiorari to review the Court of Appeals' determination that the Johnson Act does not apply to bar federal court jurisdiction over this intrastate retail electric rate case. Because of the Court of Appeals' incorrect construction of the Johnson Act's provisions, as discussed below, such a review by this Court is imperative.

(a) The Court of Appeals' reliance upon a finding of "potential interference" with interstate commerce for the exercise of federal court jurisdiction in this case is contrary to the intent of the Johnson Act and is contrary to the construction placed upon the Act by other federal courts.

All sales of electricity that were made by NPPD under the HTS-2 Rate Schedules from 1973 through 1986 were delivered to Nucor's steel mill in Nebraska. Nonetheless, the Court of Appeals holds that NPPD's rate orders "could potentially interfere with interstate commerce" based on evidence that NPPD purchases some federal hydroelectric power (the cost of which is blended into the HTS-2 Rate together with the cost of power that is generated by NPPD), that Nucor sells its products in interstate commerce, and that Nucor's corporate headquarters are located in North Carolina.

Even if such evidence of an incidental relationship to interstate commerce could support the Court's finding of "potential interference," which NPPD disputes, this is not the criterion stated in the Johnson Act. As held in *Kalinsky v. Long Island Lighting Co.*, 484 F.Supp. 176, 178 (E.D. N.Y. 1980):

> "The rule is undisputed that a rate issued by a proper state body does not interfere with interstate commerce [within the meaning of 28 U.S.C. § 1342(2)] unless it is directly burdensome or otherwise discriminatory of the [sic] interstate traffic." *New York Central R. Co. v. Illinois Commerce Commission*, 77 F.Supp. 520, at 522 (N.D. Ill. 1948).

The construction placed upon this criterion by the Court of Appeals is contrary to the intent of the Johnson Act, and it ignores the Court's own admonition in *Hanna Mining Co. v. Minnesota Power & Light Co., supra*, 739 F.2d at 1370, that "[t]he Act is to be broadly applied to keep challenges to orders affecting rates out of the federal courts." As observed by the court in *Louisiana Power & Light Co. v. Ackel*, 616 F.Supp. 445, 448 (M.D. La. 1985):

> Certainly all state rate-making action does have some influence upon or effect upon interstate commerce but these actions do not necessarily *interfere*

> with interstate commerce and the magnitude of the harm threatened by inadequate intrastate rates does not provide a cause for ignoring the clear mandate of the Johnson Act.

See also *Zucker v. Bell Telephone Co.*, 373 F.Supp. 748 (E.D. Pa. 1974), *aff'd*, 510 F.2d 971 (3rd Cir.), *cert. denied*, 422 U.S. 1027, 95 S.Ct. 2621, 45 L.Ed.2d 684 (1975); *South Central Bell Telephone Co. v. Public Service Commission of Kentucky*, 420 F.Supp. 376 (E.D. Ky. 1976); *Kansas-Nebraska Natural Gas Co. v. City of St. Edward, Nebraska*, 234 F.2d 436 (8th Cir. 1956).

(b) The procedural due process test applied by the Court of Appeals, in construing the "reasonable notice" criterion of 28 U.S.C. § 1342, is inapplicable to legislative rate hearings conducted by NPPD and is contrary to the intent of the Act.

Also directly contrary to the intent of the Johnson Act is the Court of Appeals' determination that the exercise of federal court jurisdiction over NPPD's rates is authorized if advance notice of rate hearings has not been transmitted to Nucor "in a manner which, at a minimum, has a reasonable certainty of resulting in actual notice." This procedural due process standard, which was applied by the Nebraska Supreme Court in a case involving the adequacy of service of process to support a judgment, *Gruenewald v. Waara*, 229 Neb. 619, 624, 428 N.W.2d 210, 214-15 (1988) (adopting Restatement (Second) of Judgments § 2(1)(b) (1982)), has no application to a legislative ratesetting proceeding.

The Court of Appeals' conclusion is directly refuted by the Nebraska Supreme Court's recent holding in *State ex rel. Spire v. Northwestern Bell Telephone Co.*, 233 Neb. 262, 287, 445 N.W.2d 284, 299 (1989), that "the due process clauses of the state and federal constitutions did not obligate the Legislature to grant telecommunications subscribers notice and hearing for a rate determination by the [Public Service Commission]." The reason for such holding, as stated by the Court, is that "[o]nly governmental decisions adjudicative in nature are subject to the procedural due process requirement

of notice and hearing; legislative action is exempt from the constitutional protection of procedural due process." *Id.*, 233 Neb. at 284; 445 N.W.2d at 298.

This Court has also held that utility customers are not entitled to a procedural due process hearing prior to the implementation of a rate increase. *Holt v. Yonce*, 370 F.Supp. 374, 376-77 (D.S.C. 1973) (3-judge panel), *aff'd*, 415 U.S. 969, 94 S.Ct. 1553, 39 L.Ed.2d 867 (1974). See also *Sellers v. Iowa Power & Light Co.*, 372 F.Supp. 1169, 1172 (S.D.Ia. 1974) (3-judge panel); *Georgia Power Project v. Georgia Power Co.*, 409 F.Supp. 332 (N.D.Ga. 1975); *Consolidated Aluminum Corp. v. T.V.A.*, 462 F.Supp. 464, 476-77 (M.D.Tenn. 1978).

The Court of Appeals' construction of the Johnson Act's "reasonable notice" criterion is not justified by due process considerations, under either federal law or Nebraska law. The Johnson Act is a jurisdictional statute, and it should not be construed as imposing a notice requirement which does not otherwise exist. As held by the United States Court of Appeals for the Tenth Circuit in *Tennyson v. Gas Service Co.*, *supra*, 506 F.2d at 1141:

> The notice and hearing requirement with respect to the making of rates must of necessity be viewed in light of the fact that in Kansas, "In the constitutional division of powers, the regulation of public utilities is legislative in nature." *Cities Service Gas Co. v. State Corporation Commission*, 201 Kan. 223, 232-33, 440 P.2d 660, 670 (1968). The Johnson Act does not engraft its own undefined standards of notice and hearing upon the rate making bodies of the several states but requires no more than that which is appropriate to an "order affecting rates."

In light of the Nebraska Supreme Court's holding in *State ex rel. Spire v. Northwestern Bell Telephone Co.*, *supra*, it is apparent that the notice requirement applied to the judicial proceedings in *Gruenewald v. Waara*, *supra*, is not considered "appropriate to an order affecting rates" under Nebraska law, and that the "reasonable advance publicized notice" requirement of Neb. Rev. Stat. § 84-1411 (Reissue 1987) of the Nebraska public meetings law, which governs the legislative

proceedings conducted by NPPD and all other political subdivisions in Nebraska, cannot be construed with reference to the *Gruenewald* procedural due process standard. The granting of certiorari is therefore proper to review the Court of Appeals' ruling on this issue.[8]

(c) The District Court's determination that Nebraska state courts do not provide an adequate remedy to electric ratepayers is contrary to this Court's interpretation of the requirement of a "plain, speedy and efficient" state court remedy.

Although apparently not relied upon by the Court of Appeals as a reason for exercising jurisdiction in this case, the District Court found that Nebraska electric ratepayers "have an inadequate remedy" under the holding of the Nebraska Supreme Court in *McGinley v. Wheat Belt Public Power District*, 214 Neb. 178, 332 N.W.2d 915 (1983), "because actions must be remanded to the Board of Directors for rate setting in most cases." (App. 42.) Such a finding, however, does not support a conclusion that the Nebraska state court remedy is not "plain, speedy and efficient" for purposes of the Johnson Act.

An identical provision contained in the Tax Injunction Act, 28 U.S.C. § 1341, was construed by this Court in *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512, 101 S.Ct. 1221, 1229, 67 L.Ed.2d 464 (1981), "to require a state-court remedy that meets certain minimal *procedural* criteria." (Emphasis in original.) Thus, an asserted substantive defect in the state remedy does not remove the bar to federal jurisdiction where otherwise adequate procedures exist. *Groff v. State of Maryland*, 639 F.Supp. 568, 573 (D.Md. 1986); *Strescon Industries Inc. v. Cohen*, 664 F.2d 929, 931 (4th Cir. 1981). As stated in *Hardwick v. Cuomo*, 891 F.2d 1097, 1105-06 (3rd Cir. 1989) (Emphasis in original):

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[8] See Supreme Court Rule 10.1(a), which states that certiorari may be granted when "a United States court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort."

> For a state remedy to be adequate, it must satisfy certain *procedural* criteria. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. at 522, 101 S.Ct. at 1233-34; *Sipe v. Amerada Hess Corp.*, 689 F.2d at 404. . . .
>
> . . . [T]he critical criterion as to the adequacy of the remedy available to the taxpayers is not the relief which they can obtain in New York proceedings, but whether New York provides a forum for presentation of their claims. Thus, as we have indicated, the right which they must be afforded under New York law is the *procedural* right to make their claims and not the *substantive* right to recover, and they have that procedural right.

The District Court's finding as to the judicial remedy that is available to Nucor under Nebraska law, while not dispositive of the jurisdictional issue, does demonstrate the impropriety of its judgment which awards money damages to Nucor. As discussed below, the Court's judgment is contrary to Nebraska law, and it is an attempt at judicial ratemaking which is in excess of the Court's constitutional authority.

2. Certiorari should be granted to review the judicial authority of the District Court to submit this rate case to the jury and to enter a judgment awarding damages based on evidence concerning the effect of a different ratesetting methodology.

This Court's recent opinion in *Duquesne Light Co. v. Barasch*, ___ U.S. ___, 109 S.Ct. 609, 619, 102 L.Ed.2d 646 (1989) (quoting *Minnesota Rate Cases*, 230 U.S. 352, 433, 33 S.Ct. 729, 754, 57 L.Ed. 1511 (1913)), reaffirms that "[t]he rate-making power is a legislative power and necessarily implies a range of legislative discretion." It follows from such principle that "[r]ate making is no function of the courts and should not be attempted either directly or indirectly." *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177, 42 S.Ct. 264, 267, 66 L.Ed. 538 (1922). This is especially true in the case of federal courts reviewing rates that are subject to state legislative control. See *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U.S. 264, 271, 54 S.Ct. 154, 157, 78 L.Ed. 307 (1933) ("[Federal] District courts . . . are

without authority to prescribe rates, both because that is a function reserved to the state, and because it is not within the judicial power conferred upon them by the Constitution."); *Central States Electric Co. v. City of Muscatine*, 324 U.S. 138, 143-44, 65 S.Ct. 565, 568, 89 L.Ed. 801 (1945) ("The court below was right in its view that as a federal court it had no power, at least in the absence of federal legislation purporting to confer such power upon it, to fix or adjust Central's rates, that being a legislative function of the State of Iowa. . . .This, because the court below had no power as a court of equity to fix rates, and as a federal court had no power to adjudicate a matter within the legislative competence of Iowa.").

The Nebraska Supreme Court has also uniformly held that ratesetting is strictly a legislative function. See *State ex rel. Spire v. Northwestern Bell Telephone Co.*, 233 Neb. 262, 279, 445 N.W.2d 284, 295 (1989) ("Setting a rate for a common carrier is a legislative act."); *Kansas-Nebraska Natural Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 170, 181 N.W.2d 682, 683 (1970), ("By statute, the Legislature has delegated to municipalities the authority to regulate, determine, and fix [natural gas] rates. This power being legislative in nature, it cannot be assumed by the courts and this court cannot usurp the functions of a rate-making body."); *Cornhusker Electric Co. v. City of Fairbury*, 134 Neb. 248, 250, 278 N.W. 379, 380 (1938), ("[T]he legislature has not lodged the power to regulate [electric] rates in the railway commission, and the courts have no power to assume that function."); *Nebraska Telephone Co. v. State*, 55 Neb. 627, 637, 76 N.W. 171, 174 (1898) ("Fixing a compensation which public service corporations may charge for services to be rendered by them is legislating; it is lawmaking. The power of the courts is limited to declaring what the law is, and they are precluded by the constitution from performing legislative functions; . . . .")

In accordance with these well-established principles, the Nebraska Supreme Court held in *McGinley v. Wheat Belt Public Power District*, 214 Neb. 178, 189-90, 332 N.W.2d 915, 921 (1983), that the proper form of relief in an electric

rate review case is an order directing the board of directors of the public power district to recompute the challenged rate and to refund or credit any overcharges which may result from the board's recomputation:

> Our reading of the various cases decided throughout the United States on this issue convinces us that the proper action to take in a case of this nature, absent specific evidence of individual damages, is to require the board of directors of Wheat Belt to set a proper rate for the service rendered. This would permit Wheat Belt to exercise the expertise which is better left to it than to the courts, and in effect would require Wheat Belt to merely perform the duties imposed upon it under the provisions of § 70-655. That duty is to set a rate for the period in question which is fair, reasonable, and nondiscriminatory and which confers upon and distributes among the users and consumers the benefits of a successful and profitable operation.

The equitable nature of actions such as this for the review of legislatively established utility rates was emphasized by the Nebraska Supreme Court most recently in *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 649-54, 447 N.W.2d 227, 232-34 (1989), as it reviewed a rate established under the Nebraska Municipal Natural Gas Regulation Act:

> A municipal corporation in fixing rates to be charged by a public utility acts in a legislative rather than a judicial capacity. *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). . . .
>
> As a final statement of legislative intent, Senator Landis made the following statement just prior to the bill's final reading:
>
> > . . .A municipality's legislative action in setting natural gas rates is subject to judicial review only through collateral attack by an equitable or injunctive action to determine whether the rates are fair, reasonable, and compensatory. A court may not set utility rates. A court may only judge whether the municipality acted within the scope of its legislative authority. . . .

> Floor Debate, 90th Leg., 1st Sess. 6637-38 (May 29, 1987). . . .
>
> These actions are suits in equity, similar to the *Erickson* case [*Erickson v. Metropolitan Utilities Dist.*, 171 Neb. 654, 107 N.W.2d 324 (1961)], which are collateral attacks upon the rate ordinances adopted by the defendants.[9]

Despite these clear and consistent holdings by this Court and by the Nebraska Supreme Court, the majority opinion in this case concludes that the District Court acted within the scope of its authority in awarding damages to Nucor. However, the dissenting opinion persuasively argues against the majority's conclusion, as Judge Heaney states:

> The majority argues that the instant case is distinguishable from *McGinley* because "specific evidence of individual damages" exists. *Ante* at 13 (quoting *McGinley*, 332 N.W.2d at 921). I disagree. First, even though the rate charged by the Power District was unfair, unreasonable and discriminatory, there exists no basis upon which a court could determine the fair, reasonable and nondiscriminatory cost allocation methodology that the Power District will ultimately choose. Second, the practical effect of granting damages in the instant case is similar to the practical effect of granting damages in *McGinley*. In both cases, the validity of amount paid is questionable. *See Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 387 (1974) ("To declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained" is inconsistent with clearly articulated Supreme Court precedent). Thus, damages are speculative.
>
> The fact that a written contract exists between Nucor and the Power District does not expand the scope of judicial review, since the contract terms,

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[9] *Erickson* was relied upon by the Nebraska Supreme Court in *York County Rural Public Power District*, 172 Neb. 602, 608, 111 N.W.2d 376, 379 (1961), which case established the authority of courts to review rates set by public power districts in Nebraska.

> "fair, reasonable and nondiscriminatory," are subject to the provisions of Neb. Rev. Stat. § 70-655. The contract language is entirely consistent with the statutory language, and the meaning of each is the same, controlled by the statute. A holding that the Power District breached its contract with Nucor by charging an unfair, unreasonable and discriminatory rate schedule is nothing more or nothing less than a holding that the Power District breached its statutory duty. The distinction between an action for a breach of contract and an action for a breach of statutory duty, whatever that may be in this instance, has no relevance as to the question of whether damages can be awarded or calculated.

(App. 23-24; 891 F.2d at 1353.)

Recent federal decisions, involving unsuccessful attempts by ratepayers to recover damages from utilities by framing their rate cases as federal RICO actions, directly support Judge Heaney's reasoning that since the only evidence of damages presented was Nucor's 4CP cost allocation study, the submission of the case to the jury for a determination of this issue was improper. Thus, in *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1387, 1403 (E.D.N.Y. 1989), the court held:

> Suffolk attempts to minimize the extent to which its RICO claims intrude into the sphere of state ratemaking authority by characterizing the relief it seeks as monetary damages rather than affirmative rate relief. Contrary to its contentions, its alleged injuries are in the form of utility rate increases previously approved by the PSC. Moreover, the damages it seeks are an amount equal to that portion of these rate increases that would – in its submission – not have been granted by the PSC except for the defendants' alleged misrepresentations.
>
> The distinction that Suffolk attempts to draw between damages measured by rate increases and affirmative rate relief is illusory. Where a plaintiff seeks to recover damages measurable by a comparison between approved utility rates and rates that

would have been approved but for a defendant's wrongdoing, the plaintiff's claim is treated as one for rate relief. See, *e.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2295, 69 L.Ed.2d 856 (1981); *County of Suffolk v. Long Island Lighting Co.*, 554 F.Supp. 399 (E.D.N.Y. 1983), *aff'd*, 728 F.2d 52 (2d Cir. 1984); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 648 F.Supp. 419 (D.Minn. 1986), *aff'd on other grounds*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1219, 99 L.Ed.2d 420 (1988).

The same conclusion was reached by the court in *Carr v. The Southern Co.*, 731 F.Supp. 1067, 1069-70 (S.D.Ga. 1990):

> In response to the defendants' contention that plaintiffs are attempting to involve the Court in judicial ratemaking of a public utility, plaintiffs argue that the amount of monetary damages that they are seeking can be measured to a mathematical certainty. Plaintiffs maintain that they are not challenging the PSC's determination of what constitutes just and reasonable electric rates. Rather, plaintiffs argue that they are seeking a specific and provable amount of damages resulting from the alleged fraudulent accounting practices of defendants. Defendants rebut this argument by stating that, in essence, plaintiffs are seeking the difference between the rate approved by the PSC and the rate which would have been approved if the PSC was not defrauded by the defendants. . . .
>
> . . . Also significant is Judge Weinstein's observation that
>
> > [w]hat the trial proved almost beyond peradventure was that RICO cannot, and should not, be applied in a case such as this to permit a federal jury in a civil case to second guess the ratemaking authority of the state. . . .
>
> *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. at 1393.
>
> . . . In addition, in *M.R. Taffet v. The Southern Company*, 89V-712-N, M.D.Ala.; January 5, 1990, p. 3, the court stated the following:

> While Plaintiffs' claims are based on alleged fraud, it is clear that the remedy required from this Court would constitute rate-making. Plaintiffs seek to recover the amount allegedly in excess of rates under a proper accounting method. This would require the Court to determine a "proper" rate. This new rate would apply to a likely large class of Plaintiffs. Defendants would also likely be forced to accept the Court's rate in the future to avoid further liability.
>
> . . . [I]t is difficult for me to comprehend how the relief requested by the instant case plaintiffs will not necessarily involve the Court in judicial rate-making.

See also *H.J., Inc. v. Northwestern Bell Telephone Co.*, D. Minn. Civil No. 4-86-546, 1990 U.S.Dist. LEXIS 4167 (April 4, 1990), in which the court relied on the *Carr* and *Long Island Lighting* decisions to dismiss the plaintiffs' RICO claim.

The Court of Appeals, by labeling Nucor's action as a simple breach of contract case, and by approving the $4.4 million damage award without providing any guidance to NPPD as to how it should set Nucor's or other customers' rates in order to satisfy the "fair, reasonable, and non-discriminatory" requirement, has effectively opened the courtroom doors to all ratepayers to seek court-ordered refunds by advocating the use of a different ratesetting methodology. The potential for inconsistent and irreconcilable verdicts as to ratesetting methodologies, and the accompanying loss of control by NPPD and other utilities over their rate structures, could have a devastating impact upon the system of public power established in Nebraska and elsewhere. As observed by the court in *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 61 (2d Cir. 1984):

> [C]ourts – whether state or federal – are ill-equipped to set electric rates. Were this Court, for example, to grant appellant its requested relief, it might reduce LILCO's rate base below the level required for LILCO to "break even" and, as a result,

> drive the company into bankruptcy or out of business. Also, if different courts could set different rates for electric power there would be no uniformity; and the question would arise, what rates govern?

If rate disputes are tried in the Nebraska state court system, the opportunity at least exists for NPPD and other public power districts to attempt to correct any inconsistent verdicts on appeal to the Nebraska Supreme Court. Nucor's federal court judgment, however, is not subject to review by the Nebraska Supreme Court. Under these circumstances, it is appropriate to recall this Court's warning in *Burford v. Sun Oil Co.*, 319 U.S. 315, 334, 63 S.Ct. 1098, 1107, 87 L.Ed. 1424 (1943): "Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts." NPPD respectfully submits, therefore, that this Court should grant certiorari to review carefully the authority of the District Court, under the applicable decisions of this Court and of the Nebraska Supreme Court, to submit this rate case to the jury and to enter a judgment for money damages.[10]

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[10] See Supreme Court Rule 10.1(a), which states that certiorari may be granted when "a United States court of appeals has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." See also Supreme Court Rule 10.1(c), which states that certiorari may be granted when "a United States court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court."

CONCLUSION

WHEREFORE, Petitioner Nebraska Public Power District prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Nucor Corporation v. Nebraska Public Power District*, 891 F.2d 1343 (8th Cir. 1989), and, following such review, that the judgment of the Court of Appeals be reversed and that the judgment entered against NPPD be set aside either as being outside the District Court's subject matter jurisdiction under 28 U.S.C. § 1342, or as being contrary to law and in excess of the judicial authority granted to the District Court by Article III of the Constitution of the United States.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1963
No. 87-2046

Nucor Corporation, Appellee, v. Nebraska Public Power District, Appellant.	* * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: May 12, 1989
Filed: December 13, 1989

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Nebraska Public Power District appeals from a judgment in favor of Nucor Corporation on a breach of contract claim against Nebraska Power based on electric rate overcharges. A panel of this court heard argument and then remanded for additional findings on the issue of whether the Johnson Act, 28 U.S.C. § 1342 (1982), required us to hold that the district court lacked jurisdiction to entertain this action. The district court[1] tried the

[1] The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

issue and certified its findings to this court. We affirm the district court's determination that the Johnson Act did not deprive it of jurisdiction, and we affirm the judgment on the merits.

Nebraska Power is a public corporation which provides wholesale and retail electric service throughout Nebraska. It owns and operates electric generation, transmission, and distribution facilities. Nebraska Power's largest customer, as measured by electrical usage, is Nucor, a Delaware corporation with its principal place of business in Charlotte, North Carolina. Nucor operates a steel mill near Norfolk, Nebraska, which uses electric arc furnaces to melt scrap metal. In 1972, Nebraska Power and Nucor entered into a contract for Nebraska Power to fulfill Nucor's electrical needs at the Norfolk plant. The contract contained a rate schedule, designated as HTS-2, which is available only to industrial or manufacturing customers which meet minimum demand requirements and receive service directly from high voltage facilities. Nucor is the only customer to qualify for the HTS-2 rate.

Nebraska Power establishes its electrical rates through resolutions enacted by its board of directors. No state administrative agency in Nebraska is authorized to review Nebraska Power's rates; rather, rates are subject to direct judicial review in state court. Nebraska law requires that the rates be fair, reasonable, and nondiscriminatory. Neb. Rev. Stat. § 70-655 (Reissue 1986).[2]

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[2] The statute provides:

> The board of directors of any district organized under or subject to Chapter 70, article 6, shall have

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The contract in issue contained a rate review provision which also required that the rate be fair, reasonable, and nondiscriminatory. The contract further provided that the rate must be "sufficient, but only sufficient, to collect the expense and estimated net revenue requirements associated with Large Industrial Primary Power Service." During 1973 and at two year intervals thereafter, Nebraska Power was required by the contract to prepare a study of the operating expenses and estimated net revenue requirements for this service, and Nucor's rates were to be based on the results of the studies.

Nucor brought this action against Nebraska Power claiming that Nebraska Power had continuously breached the agreement by charging unfair, unreasonable, and discriminatory rates to Nucor by using incorrect, improper, and unfair methods to allocate costs; failing to grant credits for hydroelectric power; and failing to follow the recommendations of its own consultant as to the rate

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> the power and be required to fix, establish, and collect adequate rates, tolls, rents, and other charges for electrical energy, water service, water storage, and for any and all other commodities, including ethanol, services, or facilities sold, furnished, or supplied by the district, which rates, tolls, rents, and charges shall be fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district the benefits of a successful and profitable operation and conduct of the business of the district.

Neb. Rev. Stat. § 70-655.

charged Nucor. It prayed for damages and appropriate injunctive relief.

At trial, the jury was instructed on a breach of contract theory which required Nucor to establish by a preponderance of the evidence that Nebraska Power had breached one or more of its obligations under the rate review provision, that the breaches proximately caused damage to Nucor, and to show the extent of Nucor's damage. The jury was instructed that Nebraska law, as embodied in section 70-655, authorized the board of directors to establish rates and required that such rates be fair, reasonable, and nondiscriminatory. The jury was also instructed that this section of the Nebraska statutes should be considered part of the contract between Nucor and Nebraska Power. Special interrogatories were submitted to the jury, and the jury found that the rate for each year from 1974 through 1986 was not fair, reasonable, and nondiscriminatory. The jury also specified the amount of damages sustained by Nucor for each year, an amount totalling $7,492,340. The court entered judgment only for damages occurring after August 14, 1980, determined to be $4,403,546.70, because it found that the statute of limitations applicable to written contracts barred recovery for damages before that date.

Nebraska Power appealed the judgment to this court, arguing that ratemaking is a legislative function which cannot be exercised by the courts, that the district court usurped the legislative power vested in the Nebraska Power board of directors, and that the contract rate review provision neither alters the nature of the cause of action nor permits an award of damages. Nebraska Power further asserts that the district court erred in permitting

the jury to construe the contractual and statutory terms and in admitting certain evidence.

When a panel of this court heard this appeal, a question of jurisdiction arose because of concern that the Johnson Act[3] applied. The Johnson Act prohibits district courts from interfering with ratemaking by public utilities if the four criteria of the Act are met. The case was then remanded to the district court for additional findings on the jurisdictional issue. The district court began by noting that Nebraska Power is a publicly-owned-utility which regulates itself, and that its ratemaking decisions are not subject to review by any independent regulatory body. Although the court expressed serious reservations about whether the Johnson Act applied in such circumstances, it did not resolve the issue.

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[3] The Johnson Act provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,

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Assuming that the Act did apply, the court recognized that all four statutory criteria must be satisfied in order to bar federal jurisdiction, citing our decision in *Arkansas Power & Light Co. v. Missouri Public Service Commission*, 829 F.2d 1444, 1449 (8th Cir. 1987). Since subject matter jurisdiction in federal court is based solely upon diversity of citizenship, the parties conceded that the first element had been satisfied. As to the second element, requiring that the order not interfere with interstate commerce, the court noted that the parties had not addressed this issue but nevertheless concluded that the order could potentially interfere with interstate commerce. This conclusion was based on evidence that Nebraska Power sold Nucor electricity generated in other states, that Nucor's products were distributed in other states, and that Nucor's corporate headquarters were located outside of Nebraska.

The court then turned to the third requirement of the Johnson Act, which requires that the rate order be made after reasonable notice and a hearing. The court examined both the due process clause of the Constitution and Nebraska statutes, and found that Nebraska Power did not provide reasonable notice to Nucor under either standard. Finally, the court analyzed the fourth requirement of the Johnson Act, that there exists a plain, speedy, and efficient remedy in the state courts. The court found that the state court remedy, which, in most cases, would be to

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(4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342.

remand to the board of directors to establish new rates, was inadequate. Accordingly, the court determined that the Johnson Act did not deprive federal courts of jurisdiction in this case, and certified its findings to this court.

I.

We first consider the issue of federal jurisdiction. It is well-settled that the plaintiff bears the burden of establishing subject matter jurisdiction. Nebraska Power asserts that the district court erred by improperly requiring it to bear the burden of establishing that federal jurisdiction was lacking rather than requiring Nucor to establish that jurisdiction was present. Our reading of the record, however, reveals that the court properly placed the burden upon Nucor to establish federal jurisdiction. Furthermore, we believe the record fully supports the court's conclusion that the Johnson Act does not preclude federal jurisdiction in this case.

The district court, in its order determining that the Johnson Act did not bar its jurisdiction, expressed serious doubts that the Act was intended to preclude federal jurisdiction in cases such as this one, where rates are established by a public utility not regulated by an independent state agency. Nebraska Power argues that since the Johnson Act applies to all ratemaking bodies of political subdivisions, this necessarily includes the board of directors of the Nebraska Public Power District. As the district court did not rest its decision on this ground, it is not necessary that we do so.[4]

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[4] The legislative history of the Act as passed, as well as that of a previous version, specifically referred to the existence

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We may resolve the jurisdictional issue, however, without holding that the Johnson Act is inapplicable here because we are satisfied that the district court correctly determined that the Act's requirements are not met and thus federal courts are not deprived of jurisdiction by the Act.

We turn first to the notice requirement of the Johnson Act and recite the district court's findings of fact on this issue. Nucor was Nebraska Power's single largest retail customer and the only customer qualified to receive service under the HTS-2 rate schedule. Nebraska Power's board of directors set utility rates by adopting rate resolutions during board meetings at Nebraska Power's general office in Columbus, Nebraska. Columbus is approximately 45 miles from Norfolk, which is close to

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of state commissions authorized to review and determine rates charged by public utilities. Also, during discussion of the bill, the bill's sponsor, Senator Johnson, referred to the independent regulation of public utilities and the importance of the bill to every state that has a public service commission. 28 Cong. Rec. 1829 (1934).

We express serious reservations as to whether the Act was intended to apply in this situation. Nebraska Power's argument that only about a third of the 2,096 publicly-owned electric utilities in the United States are subject to regulation by state agencies does not shed light on the intent of Congress in passing the Johnson Act. We believe that the primary thrust of the Act is to prevent public utilities from having access to a federal forum to redetermine rates previously reviewed by a state regulatory commission. As the rates before us were set by the board of directors of Nebraska Power, there is no danger of interfering with an independent regulatory agency's review of these rates because no such agency exists here.

Nucor's steel mill. Advance notice of each board meeting was published in *The Columbus Telegram* which has a circulation of 10,000 to 12,000 readers. Norfolk is not within the *Telegram's* coverage area. Neither Nucor nor its officers subscribed to the *Telegram*, and, in fact, the newspaper had only one subscriber in Stanton county where Nucor's steel mill is located. Nucor officials testified that Nucor had never received advance notice of rate increases, and had no knowledge of their right to appear at hearings to inquire about rate increases.

In certain situations, additional notice of board meetings and rate changes was given to Nebraska Power customers. Every two years, Nebraska Power conducted a wholesale rate study and notified by mail all 97 wholesale customers of their right to request a hearing on rate changes. Nebraska Power has held five or six rate hearings since 1970, and between 50 and 175 people have attended each meeting. Also, Nebraska Power routinely has given notice of proposed rate action to "retail towns," which sell electricity to their residents, pursuant to an agreement with the towns. In addition, Nebraska Power has given notice of proposed rate increases to approximately 200 retail towns as an informational courtesy.

Nebraska Power mailed monthly billing statements to all customers but has never included notices of meetings with these mailings. Nebraska Power has, however, occasionally included advertising inserts with the billing statements. Advertisements are also routinely placed in many Nebraska newspapers.

Nebraska Power makes no effort to argue that these findings by the district court are clearly erroneous. Rather, it argues that it is irrelevant to view Nucor's rates in a factual vacuum, or to hold that Nucor was entitled to special notice just because other customers in other situations have received individualized notice. Nebraska Power stresses that Nucor neither inquired about future costs or anticipated rate changes, nor requested specific advance notice. Furthermore, each time there was a rate change, Nebraska Power's rates and contracts manager met with Nucor's general manager to review the change and answer questions.

Nebraska Power points out that the Nebraska Public Meetings Law, Neb. Rev. Stat. § 84-1408 to -1414 (Reissue 1987), does not specify a method for publication of notice, but instead requires "reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body." *Id.* § 84-1411. In compliance with this mandate, Nebraska Power had adopted a resolution that notice would be published in the Telegram, that the assistant secretary would notify any members of the news media requesting notification, and that a current agenda of board meetings would be kept available for public inspection at its Columbus office.

Nebraska Power asserts that its duty to provide notice and a hearing is to be determined only by reference to state law, and not by a due process standard. The district court rejected this argument, recognizing that the notice and hearing requirement of the Act had been interpreted as requiring that the minimum standards of due process be met. The court examined Nebraska case law to

determine what constitutes "reasonable notice" as required by due process and noted that "notice can be considered adequate only if it is transmitted in a manner which, at a minimum, 'has a reasonable certainty of resulting' in actual notice." *Gruenewald v. Waara*, 229 Neb. 619, 624, 428 N.W.2d 210, 215 (1988) (quoting Restatement (Second) of Judgments § 2(1)(b), at 34 (1982)).

The evidence fully supports the district court's finding that the notice given Nucor did not have a reasonable certainty of giving Nucor actual notice. The publication in *The Columbus Telegram*, a newspaper with very limited circulation in the city of Norfolk, did not fulfill Nebraska Power's obligation. The notice did not state that ratemaking was the purpose of the board meetings, but stated little more than that an agenda was available at the general office. Further, Nebraska Power regularly performed cost analyses for wholesale rates and based Nucor's yearly rate increases, in part, on these analyses. The wholesale customers were given notice of the rate changes based on the analyses while Nucor, a retail customer, was not. The district court did not err in its determination that reasonable notice was lacking here.

It is well-established that all four criteria of the Johnson Act must be satisfied to preclude federal jurisdiction, and the failure to satisfy the notice requirement is sufficient to end our examination. *Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444, 1449 (8th Cir. 1987). We are satisfied, however, that the district court correctly determined that another criterion is not met here either. The Johnson Act requires that the rate order not interfere with interstate commerce. Nebraska Power

asserts that the district court erred in finding such interference because Nucor failed to establish that the rate was directly burdensome or discriminatory. We recognize the tentative nature of the court's comments, but nevertheless conclude that the court did not err. There was evidence that Nebraska Power wrongfully deprived Nucor of Western Area Power Administration benefits and that this resulted in approximately $7 million in overcharges to Nucor. Nucor presented testimony that this affected the cost of Nucor's goods for sale in interstate commerce. Considering this and the other factors identified by the district court, we believe that the court did not err in assessing the impact on interstate commerce.

We conclude that the district court did not err in determining that the Johnson Act did not deprive it of jurisdiction to consider the merits of this case.

Nebraska Power appears to suggest that abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), would be appropriate in this case. We believe that the facts justifying abstention in that case are lacking here. In *Burford*, the authority for the challenged decision making had been delegated to an independent commission, and the state had developed a scheme to centralize direct review of the commission's decisions in state courts of a single Texas county. In the case before us, however, the challenges are not directed at the decisions of an independent regulatory commission, nor is there a centralized state judicial review scheme in place. In addition, the fact that Nebraska Power has delayed raising the abstention issue until after a full trial on the merits shows a lack of respect for the considerations of comity underlying *Burford*.

II.

The essence of Nucor's breach of contract claim is that Nebraska Power failed to fulfill its contractual obligations to charge fair, reasonable, and nondiscriminatory rates, and to perform a cost study every two years. Specifically, Nucor argues that Nebraska Power failed to properly allocate demand costs and to regularly perform a fully-allocated cost of service study. According to Nucor, this caused Nucor to pay a disproportionate share of the demand-related costs of the power district during the years 1974 through 1986. Nucor also argues that various undisclosed charges were mishandled in determining Nucor's rate: (1) allocating the carrying, operation, and maintenance charges associated with a 230 kilovolts transmission line; (2) depriving Nucor of its full allotment of Western Area Power Administration benefits; and (3) using an incorrect production cost adjustment factor for Nucor.

Nebraska Power's substantive arguments essentially revolve around how the action is characterized, asserting that this case is more accurately characterized as ratemaking rather than as a breach of contract claim. It asserts that ratemaking is a legislative function which may not be exercised by courts, that the court's submission of this case to the jury usurped the legislative power vested in the board of directors, that the contract rate review provision neither alters the nature of the action nor permits an award of damages, and that it was error to permit the jury to construe the terms of the contract and statute.

The nature of this action must be determined by the pleadings and the issues submitted to the jury. In its

complaint, Nucor framed its cause of action as one for breach of contract based upon breach of the rate review provision of the contract, violation of section 70-655 requiring Nebraska Power to charge rates that are fair, reasonable, and nondiscriminatory, use of improper practices to allocate costs, and use of practices contrary to the recommendation of its own consultant. The case was submitted to the jury as a breach of contract claim, and the jury was given special interrogatories which required it to specifically decide whether the board had set rates which were fair, reasonable, and nondiscriminatory. We would be troubled by this language in the interrogatories, which required the jury to make findings which are arguably related to a regulatory function, were it not for the fact that this language is present in both the contract and the statute. Both require rates to be "fair, reasonable, and nondiscriminatory," and the jury was instructed that section 70-655 was to be considered a part of the contract. Thus, in order to determine whether Nebraska Power had breached the contract, the jury had to determine whether Nucor's rates were fair, reasonable, and nondiscriminatory. The court's instructions to the jury were not erroneous in this regard.

In support of its arguments, Nebraska Power identifies certain Nebraska Supreme Court decisions, particularly *McGinley v. Wheat Belt Public Power District*, 214 Neb. 178, 332 N.W.2d 915 (1983), and *York County Rural Public Power District v. O'Connor*, 172 Neb. 602, 111 N.W.2d 376 (1961), as defining the ratemaking authority of the board of directors and the court's role in reviewing such rates. *York* established that courts have the authority to review rates set by public power districts. *Id.* at 608,

111 N.W.2d at 379. *McGinley*, Nebraska Power argues, stands for the proposition that the only remedy available upon review is for a court to remand the case to the board of directors to exercise its ratemaking function. Since ratemaking is a legislative, not a judicial, function, Nebraska Power concludes that submitting this case to a jury usurped the legislative power of the board and constituted an impermissible attempt at ratemaking.

We believe Nebraska Power's reliance on *McGinley* is misplaced. The *McGinley* court held that "the proper action to take in a case of this nature, *absent specific evidence of individual damages*, is to require the board of directors . . . to set a proper rate." *McGinley*, 214 Neb. at 189, 332 N.W.2d at 921 (emphasis added). This suggests that a court presented with evidence of individual damages, as was the court below, is empowered to award monetary damages rather than remanding to the board of directors. In addition, an underlying assumption of Nebraska Power's argument is that Nucor's action is based on allegedly discriminatory rates, as was the case in *McGinley*. This mischaracterizes the nature of the suit before us, which is a claim to recover overcharges based on a breach of contract. *McGinley* dealt with the difference in rates charged customers in similar circumstances. The focus here is upon the rate charged only one customer, Nucor. Moreover, the jury verdict and the judgment entered by the court did not determine what rates Nebraska Power must charge in the future, but rather, merely determined the amount of past overcharges.[5]

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[5] The dissent argues that we accept Nucor's cost allocation method as the only fair, reasonable and nondiscriminatory

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Nebraska Power asserts that the district court erred in permitting the jury to construe the terms of the contract and the statute in issue, Neb. Rev. Stat. § 70-655, because the terms in issue were not ambiguous. We believe there was no error. The contract, which incorporated the language of the statute, used words that were ambiguous in the sense that they were of a sufficiently technical nature to be the subject of expert testimony. Both parties presented expert testimony which offered the jury differing views of the terminology. Under the circumstances, it was proper for the jury, aided by expert testimony, to consider the terminology in issue here. The role of the jury in such circumstances has been recognized by Nebraska cases. *Olds v. Jamison*, 195 Neb. 388, 392, 238 N.W.2d 459, 462 (1976); *Ely Constr. Co. v. S & S Corp.*, 184 Neb. 59, 67, 165 N.W.2d 562, 567 (1969). The parties raise numerous points in their arguments which we believe lack sufficient merit to justify further discussion of this issue.

III.

Nebraska Power asserts error in the district court's resolution of certain evidentiary issues. It argues that it

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method. This mischaracterizes our holding. We simply hold that a jury could properly find, based upon evidence of Nebraska Power's treatment of several items of cost allocation, outlined above, that the particular rate charged was not fair, reasonsable, [sic] and nondiscriminatory, and, upon being presented with specific evidence of individual damages, could properly determine the amount of past overcharges.

was improper for the court to receive testimony from Nucor's experts regarding terms of art and industry standards, to permit the jury to construe the contract and statute with reference to this testimony, and to receive evidence and testimony concerning rate making methodology.

The crux of Nebraska Power's argument is that the court should have defined for the jury the terms "fair," "reasonable," and "nondiscriminatory," rather than permitting experts to testify as to their meanings and instructing the jury that it could consider the experts' definitions. These terms are not technical in nature, Nebraska Power argues, and thus expert testimony is not necessary. It relies on *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977), in which the court held that it was improper to allow a securities expert to testify as to the meaning of the term "best efforts" in a contract dispute. *Id.* at 508-09.

We believe the court did not err in admitting this expert testimony. Courts have frequently recognized the value of expert testimony defining terms of a technical nature and testifying as to whether such terms have acquired a well-recognized meaning in the business or industry. *See Energy Oils v. Montana Power Co.*, 626 F.2d 731, 736-37 (9th Cir. 1980). We note that Nebraska Power experts also testified as to the meanings of terms of art and whether Nebraska Power's ratemaking methods were used elsewhere in the industry. Finally, we observe that the admission of evidence is largely left to the discretion of the trial court. We conclude that there was no abuse of discretion in admitting this testimony and no

error of law in instructing the jury as to the use of such testimony.

The court also erred, according to Nebraska Power, in admitting an exhibit prepared by Nucor which utilized a four-month coincident peak cost allocation method. Both parties vigorously argue, in exhaustive technical detail, whether this evidence was properly admitted.

We are not persuaded that the court erred in this respect. We first observe that Nebraska Power also introduced an exhibit demonstrating a method of cost computation. More importantly, this case revolves around alleged overcharges resulting from improper cost allocation, and resolution of these issues required determining whether the rates were fair, reasonable, and nondiscriminatory. We believe that this exhibit was relevant to such issues. In essence, the parties attempt to escalate the simple question of admissibility of an exhibit into an additional opportunity to address the merits of this case.

Nebraska Power's final argument is that the verdict and judgment are not supported by the evidence. This argument is primarily addressed to the amount of damages awarded, based on an assertion that the total jury award bears no relationship to Nucor's evidence of damages. This is without merit. Where it has been proven that damage has been sustained, and the only uncertainty concerns the exact amount, there need only be evidence from which the amount of damages can be ascertained with reasonable certainty. *Nebraska Pub. Power Dist. v. Austin Power*, 773 F.2d 960, 969 (8th Cir. 1985); *Delp v. Laier*, 205 Neb. 417, 425, 288 N.W.2d 265, 269-70 (1980). Nucor's expert, Stephen Daniel, who was vigorously

cross-examined, testified that the total amount of overcharges was $15,744,844. We believe there is sufficient evidence to support the jury's determination.

IV.

Nucor argues that the court erred in entering judgment only for damages sustained in the years 1981 to 1986, excluding the earlier years as barred by the statute of limitations. Nucor contends that it was entitled to a jury determination of whether there was fraudulent concealment by Nebraska Power and whether such conduct defeats the operation of the statute of limitations. Nucor essentially offers two arguments in support of its fraudulent concealment theory: (1) that Nebraska Power committed affirmative acts of fraudulent concealment, which included inducing Nucor to locate in its service area with awareness of the disparity between the parties' knowledge of ratemaking methodology, withholding various cost studies, and communicating incorrect information regarding cost allocation; and (2) that even if there were not affirmative acts of fraudulent concealment, there is a fiduciary relationship between the parties such that mere silence on the part of Nebraska Power constitutes fraudulent concealment which will toll the statute of limitations.

Addressing first the claim that Nebraska Power committed affirmative acts of fraudulent concealment which warrant tolling the statute of limitations, we are not persuaded that the district court erred in refusing to submit this issue to the jury. While we recognize that issues of fraudulent concealment relating to a statute of limitations defense are normally questions of fact for the

jury, *Vrbsky v. Arendt*, 119 Neb. 443, 448-49, 229 N.W. 337, 339 (1930), when the evidence leaves no room for a reasonable difference of opinion, the district court may resolve the issue as a matter of law. *Trace X Chemical, Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 265 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). Moreover, "a mere scintilla of evidence is insufficient to present a question for the jury." *J.E.K. Indus. v. Shoemaker*, 763 F.2d 348, 353 (8th Cir. 1985).

We also believe that the court did not err in refusing to submit to the jury Nucor's claim that a fiduciary relationship existed between the parties such that Nebraska Power had a duty to disclose, and therefore its silence constituted fraudulent concealment. The Nebraska Supreme Court has not had occasion to decide whether the existence of a fiduciary relationship prevents a cause of action from being barred by the statute of limitations if the defendant commits no affirmative acts of concealment but is merely silent. Nor has the Nebraska Supreme Court ruled that a public utility owes the obligations of a fiduciary to its customers. In the absence of guiding precedent, "we accord substantial deference to the district court's interpretation of state law." *Kansas State Bank in Holton v. Citizens Bank of Windsor*, 737 F.2d 1490, 1496 (8th Cir. 1984).

Finally, we address Nucor's argument that the district court erred in failing to award prejudgment interest. Nucor's argument is without merit. The court correctly recognized that, under Nebraska law, prejudgment interest may only be recovered on claims which are liquidated. The court acknowledged that the design of rates is not an exact science and concluded that Nucor's claim was not liquidated. It was not possible to compute the

amount of damages here with exactness without reliance upon opinion or discretion. *See Hill v. City of Lincoln*, 221 Neb. 719, 723, 380 N.W.2d 296, 299 (1986).

In sum, we hold that because the requirements of the Johnson Act are not satisfied, the Act does not preclude federal jurisdiction in this case. We also hold that Nucor is entitled to its judgment of $4,403,546.70 on its breach of contract claim but is not entitled to prejudgment interest. Accordingly, we affirm the judgment of the district court.

HEANEY, Senior Circuit Judge, concurring in part and dissenting in part.

I concur in Parts I, III and IV of the majority opinion as far as it is necessary to reach those issues. I dissent from Part II.

While I accept that the Power District may have breached its duty to charge fair, reasonable and non-discriminatory rates, I believe that it was error for the district court to submit the question of damages to the jury. Damages are too speculative.

This Court lacks both the wherewithal and the legislative authority to determine damages in this instance because more than one fair, reasonable and non-discriminatory rate schedule may exist. Courts do not have the expertise or resources necessary to determine proper rate schedules or to permit an integrated approach to rate regulation. Moreover, the power of a Nebraska court is limited to determining only whether the rate schedule in question is fair, reasonable and non-discriminatory. See, *e.g.*, *McGinley v. Wheat Belt Public Power District*, 332 N.W.2d 915 (Neb. 1983).

> Fixing a compensation which public service corporations may charge for services to be rendered by them is legislating; it is lawmaking. The power of the courts is limited to declaring what the law is, and they are precluded by the Constitution from legislative functions; . . . [W]e know of no court which has ever claimed it had the authority to determine what compensation would be a reasonable one for a service to be performed by such a corporation.

Nebraska Telephone Co. v. State, 76 N.W. 171, 174 (Neb. 1898). *See also, Metropolitan Utilities Dist. v. City of Omaha*, 107 N.W.2d 397 (Neb. 1961) ("It would appear there are several formulas, under approved accounting methods, by which the board of directors of the [sewage] district could determine the cost. . . . However, it should be remembered that it is not for the city or the courts to determine what the formula is to be, but it is a matter for the board of directors of the district to decide. . . ."). Thus, I am unwilling to accept, as the majority appears to have done, that Nucor's cost allocation methodology is the only fair, reasonable and nondiscriminatory method.

The remedy of damages is not supported by Nebraska case law. *McGinley v. Wheat Belt Public Power District*, 332 N.W.2d 915 (Neb. 1983); *York County Rural Public Power District v. O'Connor*, 111 N.W. 2d 376 (Neb. 1961).

In *York County*, the Nebraska Supreme Court held that the plaintiff power district could recover in damages the difference between amount paid to the plaintiff by the defendant consumer and amount required by a new rate schedule adopted by the plaintiff power district that the court held to be fair, reasonable and nondiscriminatory.

In *McGinley*, the Nebraska Supreme Court denied damages even though it found the rate charged to plaintiffs unfair, unreasonable and discriminatory. *McGinley v. Wheat Belt Public Power District*, 332 N.W.2d at 921.

> Having therefore found the rate invalid, we are now confronted with determining the proper relief to be granted. Members of Rate Class 76[6] have asked this court to render judgment for the members of Rate Class 76 in an amount equal to the difference between what members of the Rate 75 paid and what members of Rate 76 paid. Were we to do that, we would be in effect granting to members of Rate Class 76 the same unjust and arbitrary rate which was granted to members of Rate Class 75 and which we have now declared invalid. Such relief is not appropriate in a case of this nature. . . .
>
> While there are cases to be found where damages such as requested by the plaintiffs herein have been awarded, they are cases generally where both a statute authorizes such damages and the evidence supports such damages.

Id.

The majority argues that the instant case is distinguishable from *McGinley* because "specific evidence of individual damages" exists. *Ante* at 13 (quoting *McGinley*, 332 N.W.2d at 921). I disagree. First, even though the rate charged by the Power District was unfair, unreasonable

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[6] *McGinley* involved different rates charged to consumers who used energy in exactly the same manner but for the date they signed on as customers of the Power District. Rate Class 75 included all customers receiving service before a certain date in 1975. Rate Class 76 included all customers receiving service after that date in 1975.

and discriminatory, there exists no basis upon which a court could determine the fair, reasonable and non-discriminatory cost allocation methodology that the Power District will ultimately choose. Second, the practical effect of granting damages in the instant case is similar to the practical effect of granting damages in *McGinley*. In both cases, the validity of amount paid is questionable. *See Federal Power Commission v. Texaco. Inc.*, 417 U.S. 380, 387 (1974) ("To declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained" is inconsistent with clearly articulated Supreme Court precedent). Thus, damages are speculative.

The fact that a written contract exists between Nucor and the Power District does not expand the scope of judicial review, since the contract terms, "fair, reasonable and nondiscriminatory," are subject to the provisions of Neb. Rev. Stat. § 70-655. The contract language is entirely consistent with the statutory language, and the meaning of each is the same, controlled by the statute. A holding that the Power District breached its contract with Nucor by charging an unfair, unreasonable and discriminatory rate schedule is nothing more or nothing less than a holding that the Power District breached its statutory duty. The distinction between an action for a breach of contract and an action for a breach of statutory duty, whatever that may be in this instance, has no relevance as to the question of whether damages can be awarded or calculated.

The appropriate remedy in this circumstance is to remand the matter to the Board of Directors of the Power District and order it to hold a prompt hearing as to rates

for the years in question. All classes of consumers, including Nucor, the farmers who use power for irrigation, and the homeowners who use power for air conditioning, must be given adequate notice and opportunity to participate at this hearing. Once this is done, the Power District can determine the fair, reasonable and nondiscriminatory rates it intends to charge all consumers. From that determination, the Power District must, at that time, rebate all overcharges that have resulted.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-1963/2046NE

Nucor Corporation, Appellee,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
v.	*	
Nebraska Public Power District, Appellant.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Arnold took no part in the consideration or decision of the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

March 16, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-1963 & 87-2046

Nucor Corporation, Appellee/Cross Appellant, v. Nebraska Public Power District, Appellant/Cross Appellee.	* * * * * * * * *	Appeals from the United States District Court for the District of Nebraska.

Filed: June 30, 1988

Before ARNOLD, Circuit Judge, ROSS and HENLEY, Senior Circuit Judges.

ORDER

Nebraska Public Power District (NPPD), which provides wholesale and retail electric service throughout Nebraska, appeals from an adverse jury verdict awarding damages to Nucor Corporation (Nucor) for utility overcharges. After a month-long trial in this breach of contract action, the jury returned a verdict for Nucor in the amount of $7,492,340 for damages sustained from 1974 through 1986. Following trial, the district court reduced the jury's award on the grounds that the statute of limitations, Neb. Rev. Stat. § 25-205, barred recovery of damages which occurred prior to August 14, 1980. The district

court entered judgment in favor of Nucor for $4,403,546.70 based upon the jury's assessment of damages for the years 1980 through 1986. Thereafter, NPPD filed this appeal; and Nucor filed a cross-appeal, challenging the district court's application of the statute of limitations and the court's denial of prejudgment interest.

On March 22, 1988, after the parties had submitted briefs on the merits of the appeal and cross-appeal, NPPD filed with this court a suggestion of lack of jurisdiction and motion to remand with directions to vacate judgment and to dismiss the action. In its accompanying brief, NPPD argued that the district court lacked subject matter jurisdiction over the present action because the action falls within the scope of the Johnson Act of 1934, 28 U.S.C. § 1342. The court requested additional briefing by the parties on this issue, and the matter was heard by the court, along with the merits of the appeal, on June 15, 1988.

Based upon the parties' briefs and arguments on the jurisdictional issue, we conclude that the district court should have the opportunity to address this matter in the first instance. Therefore, we remand this case for the purpose of allowing the district court to address the question whether the federal courts have subject matter jurisdiction over this action, based upon the record and such additional evidence or briefing as the district court deems necessary. The district court is requested to certify its findings and conclusions on this issue to this court, which retains jurisdiction of this appeal pending remand.

A true copy.

Attest.

/s/ Robert St. Vrain
CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NUCOR CORPORATION, Plaintiff, v. NEBRASKA PUBLIC POWER DISTRICT, Defendant.	CV. 85-0-773 MEMORANDUM AND ORDER (Filed December 6, 1988)

This matter is before the Court for determination of the issue of subject matter jurisdiction after remand from the Eighth Circuit Court of Appeals. **Nucor v. Nebraska Public Power District,** No. 87-1963 and No. 87-2046, slip op. (8th Cir. June 30, 1988) (Filing No. 112).

This is an action for breach of contract. Jurisdiction is premised on 28 U.S.C. § 1332 (diversity of citizenship). This matter was tried in April, 1987 and Nucor recovered a jury verdict in the amount of $7,492,340.00, which was subsequently reduced to judgment in the amount of $4,403,546.70 on the Court's own motion. On appeal to the Eighth Circuit Court of Appeals, NPPD raised the issue of subject matter jurisdiction for the first time. NPPD contends that this court lacks jurisdiction by virtue of the Johnson Act, 28 U.S.C. § 1342.

The Johnson Act provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or a rate-making body of a state political subdivision, where:

> (1) jurisdiction is based solely on diversity of citizenship or repugnance of the order to the federal constitution; and
>
> (2) the order does not interfere with interstate commerce; and
>
> (3) the order has been made after reasonable notice and a hearing; and
>
> (4) a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1342.

Additional evidence regarding the jurisdictional issue was taken on September 29-30, 1988.[1] The Court finds it is not deprived of jurisdiction by virtue of the Johnson Act. The four statutory criteria of the Johnson Act have not been met. The following are the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

NPPD is a public corporation and political subdivision organized pursuant to Neb. Rev. Stat. § 70-605, **et seq.** It is a public utility which constructs, owns and operates electric generating plants, transmission lines, substations and distribution systems and purchases, generates, transmits, distributes and sells electricity at wholesale and retail for lighting, power, heating and other purposes. It sells power to wholesale and retail customers throughout eighty-seven (87) counties in Nebraska.

Nucor is a corporation engaged in the business of refining steel. It markets its products throughout the

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[1] The parties also rely on the transcript and exhibits from the trial in support of their respective positions.

United States. Its corporate headquarters are located in South Carolina. Nucor owns and operates a steel mill located five miles from Norfolk, in Stanton County, Nebraska.

NPPD provides power to Nucor. Nucor is NPPD's single largest retail customer, the only member of the Large Industrial Primary Power service class, and the only NPPD customer qualified to receive service pursuant to the HTS-2 rate schedule.

The orders at issue in this case are rate increases implemented from 1974 until 1986. NPPD's rate-making body is its Board of Directors. NPPD's rates, including the HTS-2 rate schedule, are fixed by its Board of Directors pursuant to rate-making authority under Neb. Rev. Stat. § 70-655.[2] The rates are adopted by resolution during open sessions of regularly scheduled meetings held at NPPD's general offices in Columbus, Nebraska. Notice of each meeting is published in **The Columbus Telegram.**[3]

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[2] The HTS-2 rates schedules at issue were approved at meetings which occurred on July 21, 1972; November 21, 1974; October 30, 1975; November 18, 1977; October 31, 1978; August 1, 1979; November 15, 1979; November 20, 1980; November 19, 1981; November 19, 1982; and November 17, 1983.

[3] The notice typically provides as follows: "LEGAL NOTICE – Regular meeting of the Board of Directors of Nebraska Public Power District, which meeting will be open to the public will be held Thursday, November 18, 1982, beginning at 2 p.m., at the Columbus General Office, Columbus, Nebraska; and reconvening on Friday, November 19, 1982, at a time to be announced prior to the adjournment on November 18. An agenda for such meeting kept continuously current is available

(Continued on following page)

The Columbus Telegram is a small-market newspaper serving the Columbus, Nebraska, area. Its circulation is between 10,000 and 11,000 people. The City of Norfolk and Village of Stanton are not included within its coverage area. **The Columbus Telegram** has only one subscriber located in Stanton County. Neither Nucor nor any of its officers subscribe to or regularly obtain **The Columbus Telegram.** Columbus, Nebraska, is located approximately forty-five (45) miles from Norfolk, Nebraska.

The evidence shows that additional notice of meetings and rate changes is provided to certain NPPD customers in certain situations. With respect to its wholesale customers (generally municipalities), NPPD conducts a wholesale rate study every two years. All ninety-seven (97) wholesale customers are notified by letter of their opportunity to request a hearing on rate changes. NPPD has conducted five or six of these hearings since 1970. Between fifty (50) and one hundred twenty-five (125) people have attended these hearings at which customers can call witnesses such as staff members or consultants. After the hearings, the rate proposals are reconsidered. Many of NPPD's contracts with the wholesale customers require such notice and the procedures were designed to facilitate a better working relationship with wholesale customers.

(Continued from previous page)

for public inspection during business hours at the office of the Assistant Secretary of the District at the Columbus General Office. NEBRASKA PUBLIC POWER DISTRICT." (**See, e.g.,** Exhibits 186 and 703).

Nucor [sic] also has agreements with certain of its retail customers (retail towns) which provide for mailed notice of Board meetings (Exhibits 145B, 143, 142, 140). The evidence shows, for example, that NPPD routinely provides notice to its retail town customers that rate action is scheduled or tentatively scheduled for particular board meetings. (**See, e.g.,** Exhibit 145(b)). Also, NPPD officials testified that notices of proposed rate increases were mailed to approximately two hundred (200) retail towns as an informational courtesy (**See e.g.,** Exhibits 126, 128, 143 and 145(b)).

NPPD sends monthly billing statements to all of its customers. Included in the billing statements are occasional seasonal messages and advertising inserts. Notices of meetings have never been sent with the billing statements. Also, NPPD routinely places advertisements in many Nebraska newspapers.

When required in 1979 to transmit notice and conduct hearings relating to the adoption and implementation of certain standards pursuant to the Public Utility Regulatory Policies Act, 16 U.S.C. § 2611, *et seq.* (hereinafter, PURPA), NPPD caused notice to be published for three consecutive weeks in eighty-seven (87) counties. (**See** Exhibit 185). Public hearings were also conducted in four locations in the state.

Nucor officials, John Doherty, Nick Johnson and Donald Schaufelberger, testified that Nucor never received any advance notice of rate increases. They also testified that they had no knowledge of their right to appear at any hearing to question the rate increases.

A threshold issue is whether the Johnson Act is applicable to the present action at all. This case presents a unique situation for the reason that NPPD is a publicly owned utility which effectively regulates itself. Rate-making decisions of the Board are not subject to review by any independent intermediate regulatory body. Unlike the state administrative agencies and rate-making bodies of state political subdivisions involved in other Johnson Act cases, NPPD is itself the utility which charges and collects the rates at issue. The Court has serious reservations about the applicability of the Johnson Act in these circumstances.[4]

The Johnson Act envisions independent regulation. A publicly owned utility has been held not to be a public utility within the meaning of the Johnson Act. **Municipal**

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[4] The Court dealt with a similar issue in consideration of defendant's motion for directed verdict at trial. NPPD then asserted that this Court lacked jurisdiction to award damages for the reason that rate-making is a legislative function. NPPD relied on **McGinley v. Wheat Belt Public Power District,** 214 Neb. 178, 332 N.W.2d 915 (1983), as authority for that proposition. In **McGinley,** the Nebraska Supreme Court found that, although actions by boards of directors of public power districts are subject to judicial review, it was proper "absent evidence of individual damages" to remand the case to the board of directors of the public power district to set a proper rate. This Court found that the holding in **McGinley** was not applicable for the reason that **McGinley** involved discriminatory rates and the present action involves overcharges. At the time it overruled NPPD's motion for directed verdict, the Court was troubled by the contradiction inherent in the prospect of allowing the Board of Directors, who were ultimately found to have breached their contract to set fair rates, to set the rates again.

Electric Utilities v. Power Authority of the State of New York, No. 80 CIV. 1149 slip op. at 4 (S.D.N.Y. 1981) (LEXIS, Genfed library Courts file). "One cannot escape the conclusion that Congress, in passing the Johnson Act, did not foresee or intend this limited curtailment of federal jurisdiction to apply to a suit involving an entity . . . which is both a regulator and a regulatee." **Id.** The legislative history of the Act shows Congress' concern with privately owned utilities challenging orders of separate governmental rate-making authorities. **See, e.g.,** S. Rep. No. 125, 73rd Cong., 1st Sess. 1-33 (1933); 78 Cong. Rec. 1915, 2014, 2238, 8325, 8351, 8433, 8487 (1933).

In addition, by its terms, the Johnson Act prohibits district courts from "enjoining, suspending or restraining the operation or compliance with" an order affecting rates. As noted, this is a damage action and the Court awarded no prospective relief. However, the Act has been interpreted to apply to actions seeking both declaratory relief and damages, **Tennyson v. Gas Services Co.,** 506 F.2d 1135, 1139 (10th Cir. 1974), and to actions seeking only monetary damages. **Miller v. NYS Public Service Comm'n,** 807 F.2d 28, 33 (2d Cir. 1986). Also, "[t]he act is to be broadly applied to keep challenges to orders effecting rates out of the federal courts." **Hanna Mining Co. v. Minnesota Power & Light Co.,** 739 F.2d 1368, 1370 (8th Cir. 1984). It thus appears that the Johnson Act may be applicable to this action even though the Court awarded only retrospective relief. In light of its findings that the statutory criteria of the Johnson Act are not met, the Court need not resolve these issues.

Assuming general applicability of the Johnson Act, all four of the statutory criteria must be met if federal

jurisdiction is to be excluded. **Arkansas Power & Light Co. v. Missouri Public Service Comm'n,** 829 F.2d 1444, 1449 (8th Cir. 1987). The parties concede that the first criteria has been met. Jurisdiction is based solely on diversity of citizenship.

The statute secondly requires that the order does not interfere with interstate commerce. 28 U.S.C. § 1342(2). The orders at issue here may well interfere with interstate commerce. The parties have not addressed this issue. There was evidence adduced at trial that power sold to Nucor by NPPD was generated in other states (WAPA Power). Also, the evidence shows that the products manufactured and sold by Nucor are distributed in other states. Nucor's corporate headquarters are also located in another state. Of course, a contact or effect on interstate commerce does not constitute an interference unless it is directly burdensome on interstate traffic. **Kalinsky v. Long Island Lighting Co.,** 484 F. Supp. 176, 178 (E.D.N.Y. 1980). The significance of the interstate contacts and effects in this case is unclear. The record in this case, however, does not support a finding that the orders at issue do not interfere with interstate commerce.

Third, the Johnson Act precludes federal jurisdiction where an order is entered after reasonable notice and a hearing. 28 U.S.C. § 1342(3). The Act does not define reasonable notice and hearing; "[e]xcept that it must be reasonable, the Act does not specify the kind of notice or prescribe any form or method of practice or procedure". **Mississippi Power & Light Co. v. City of Jackson, Miss.,** 9 F. Supp. 564, 568 (S.D. Miss. 1935).

The Johnson Act "does not engraft its own undefined standards of notice and hearing upon the rate-making bodies of the several states but requires no more than that which is appropriate to an 'order affecting rates.' " **Tennyson,** 506 F.2d at 1141. The notice and hearing requirement has been interpreted to mean that which is adequate to meet the minimum standards of due process. **Kansas-Nebraska Natural Gas Co. v. City of St. Edward,** 134 F. Supp. 809, 827 (D. Neb. 1955), **aff'd,** 234 F.2d 436 (8th Cir. 1956). The "vital elements necessary to constitute due process of law are . . . 'a hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important.' " **Mississippi Power & Light Co. v. City of Jackson,** 9 F. Supp. at 569.

The Act apparently contemplates actual notice and hearing. The "fact of a reasonable notice and hearing is all that need be determined for jurisdictional purposes." **Id.** What "eventually matters is the actual giving of notice and allowance of hearing." **Kansas-Nebraska Natural Gas Co. v. City of St. Edward,** 134 F. Supp. at 827. At the least, the Act requires utilization of procedures reasonably calculated, under all the circumstances to inform rate-payers of an order affecting rates. **See, e.g., Zucker v. Bell Telephone Co. of Pennsylvania,** 373 F. Supp. 748 (E.D. Pa. 1974) (holding that numerous and varied procedures including posting notice of a rate increase in business offices, together with mailing letters to all customers constituted sufficient notice under Johnson Act notwithstanding the professed lack of actual notice by plaintiff), **aff'd, without op.,** 510 F.2d 971 (3d Cir.), **cert. denied,** 422 U.S. 1027 (1975).

NPPD argues that the notice and hearing requirements are to be determined with reference only to state law. It asserts that it complied with the requirements of Nebraska's open meeting law, Neb. Rev. Stat. § 84-1408, **et seq.** That statute applies to all governing bodies of all political subdivisions. Neb. Rev. Stat. § 84-1409(1)(a). It requires that "[e]ach public body shall give reasonable advance notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes". Neb. Rev. Stat. § 84-1411. The statute further requires "[s]uch notice shall be transmitted to all members of the public body and to the public." It is undisputed that NPPD published notice in technical compliance with its rules. Whether that notice was adequately transmitted to the public so as to constitute reasonable notice is the issue.

"Reasonable notice" is not defined in the statute, nor has it been adequately interpreted in case law. **But see Pokorny v. City of Schuyler,** 202 Neb. 334, 338, 475 N.W.2d 281, 284 (1979) (the posting of a notice in three public places at 10 p.m. on the day preceding a hearing is not reasonable advance public notice as required by § 84-8411). In another context, the Nebraska Supreme Court held that "notice can be considered adequate only if it is transmitted in a manner which, at a minimum 'has a reasonable certainty of resulting' in actual notice." **Gruenewald v. Waara,** 229 Neb. 619, 624, 428 N.W.2d 210, 214-15 (1988) (adopting **Restatement (Second) of Judgments** § 2(1)(b)(1982)).

The Court finds that under either a due process test or the Nebraska statute, NPPD did not provide reasonable notice in this case. Though not dispositive, the notice

provided to wholesale customers and retail towns and pursuant to PURPA provides evidence of easily available alternative means of notice and of NPPD's awareness of those means. Under the circumstances, the notice provided to Nucor cannot be said to have a reasonable certainty of resulting in actual notice. In fact, it appears that the opposite may have been true. Of special significance is the fact that Nucor was NPPD's only customer in the HTS-2 rate schedule class. Accordingly, it was the only rate-payer to which notice of the rate changes needed to be transmitted. A simple letter addressed to Nucor advising of the date and time of the meeting and the fact that the rate charged Nucor would be on the agenda and offering Nucor an opportunity to appear and present any information which they desired with respect to the setting of that one rate-payer rate would have fulfilled NPPD's obligation to Nucor.

The Court finds that a single publication in the classified section of the Columbus newspaper with a limited coverage area which in fact did not include the City of Norfolk does not fulfill NPPD's obligation to give Nucor reasonable notice and an opportunity to be heard with respect to the rates to be charged Nucor.

The notice published in the **Columbus Telegram** did not contain any specific notice that rate-setting was the subject of the board meetings. The publication provided no more than that an agenda could be inspected at general offices in Columbus. No agenda was published or sent to the public, and no provisions were made by which rate-payer could obtain a copy of the agenda. In addition, the notice does not indicate that rate payers could appear,

be heard or present evidence at the board meetings. Under the circumstances, the notice cannot be considered adequate.

There is no dispute that Nucor did not have any actual hearing. The "vital part of Section 1342(c) is the provision for a hearing". **General Investment & Service Corp. v. Wichita Water Co.,** 236 F.2d 464, 467 (10th Cir. 1956). The purpose of a hearing following notice "is to give an interested party an opportunity to present evidence and to have findings of fact based thereon made by the administrative agency which will then form the basis of a judicial review of the order". **Id.** The absence of such opportunities does not constitute a fair hearing essential to due process. **Id.** There is "[n]o doubt Congress had this in mind when it passed the Johnson act . . . [i]n the absence of such safeguards, Congress intended the federal court should have jurisdiction." **Id.**

The evidence shows that Nucor was given yearly rate increases which were based in part on cost analyses done by NPPD for wholesale rates. The wholesale customers were given notice and an opportunity to contest the rates while Nucor was not. Nucor had no reason to question the reasonableness of the rates until 1982 when the increase in power costs did not comport with decreased costs in other areas. At that point Nucor hired an independent consultant and requested access to the studies upon which NPPD's rates were based. Nucor later obtained a copy of the 1981 Beck study, and found that NPPD had increased Nucor's rates by 15 percent when NPPD's consultants had recommended a decrease of 3.9 percent. In the context of negotiations for settlement of the claim which eventually became this lawsuit, Nucor

representatives were present at a meeting but were never afforded an opportunity to present any evidence with respect to their consultant's conclusions. Those meetings cannot be considered a hearing even under a minimal standard. In fact, when approached by a Nucor official about the possibility of appearing at a board meeting, a NPPD board member assured the Nucor official that their concerns would be presented to the board. Under the circumstances, it is clear to the Court that Nucor has not been accorded due process in this matter.

The fourth criteria under the Johnson Act is that federal jurisdiction is precluded if a plain, speedy and efficient remedy may be had in the courts of such state. The Court cannot state that this requirement has been met. Actions by Boards of Directors of Public Power Districts are subject to judicial review but rate-payers have an inadequate remedy in that actions must be remanded to the Board of Directors for rate setting in most cases. **See, e.g., McGinley v. Wheatbelt Public Power District,** 214 Neb. at 189, 332 N.W.2d at 921-22.

Accordingly, the Court finds that federal jurisdiction is not precluded by the Johnson Act. These findings are hereby certified to the United States Court of Appeals for the Eighth Circuit.

DATED this 6th day of December, 1988.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

NUCOR CORPORATION, Plaintiff, v. NEBRASKA PUBLIC POWER DISTRICT, Defendant.	)	CV. 85-0-773 ORDER NUNC PRO TUNC (Filed January 17, 1990)

This matter is before the Court on its own motion. In order to correct certain inadvertent errors in its earlier memorandum and order (Filing No. 135),

IT IS ORDERED:

1) The first sentence of the third paragraph on page 4 is amended to state:

> NPPD also has agreements with certain of its retail customers (retail towns) which provide for mailed notice of Board meetings (Exhibits 145B, 143, 142, 140).

2) The third paragraph on page 5 is amended to state:

> Nucor officials, John Doherty and Nick Johnson testified that Nucor never received any advance notice of rate increases. They also testified that they had no knowledge of their right to appear at any hearing to question the rate increases. The testimony of Mr. Schaufelberger, the President and Chief Executive Officer of NPPD, is not inconsistent with the testimony of Mr. Doherty and Mr. Johnson.

DATED this 17th day of January, 1989.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

NUCOR CORPORATION, Plaintiff, v. NEBRASKA PUBLIC POWER DISTRICT, Defendant.	)	CV. 85-0-773 MEMORANDUM AND JUDGMENT (Filed May 15, 1987)

This matter is presently before the Court on its own motion. Trial of this action commenced April 6, 1987, and concluded May 4, 1987. Thereafter the jury returned its verdict in favor of plaintiff on May 6, 1987.

The jury found the rates and charges established by N.P.P.D. were not fair, reasonable and nondiscriminatory for the years 1974 through 1986, inclusive. Thus, N.P.P.D. had breached the rate review provision of its contract with Nucor during each of those years. During trial, the Court found that the statute of limitations on written contracts, Neb.Rev.Stat. § 25-205, barred any recovery of damages which occurred before August 14, 1980. Therefore, judgment will be entered only for damages which occurred after [sic] date.

In answering Question No. 5 to the verdict form, the jury found following damages proximately caused by N.P.P.D.'s failure to set proper rates:

1980	–	$ 642,465
1981	–	1,084,884
1982	–	998,362
1983	–	499,181
1984	–	578,621
1985	–	499,181
1986	–	499,181

The Court finds the 1980 figure should be prorated on the basis of the number of days remaining in the year after August 14, 1980. As such, the recoverable damages for that year amount to $244,136.70. The sum of this figure and the damages assessed by the jury for the years 1981 through 1986, inclusive, is $4,403,546.70.

The plaintiff seeks recovery of prejudgment interest on this amount. Under Nebraska law, however, prejudgment interest may only be recovered on claims that are liquidated. **Land Paving Co. v. D.A. Construction Co., Inc.**, 215 Neb. 406, 407, 338 N.W.2d 779, 780 (1983); **Lackawanna Leather Co. v. Martin & Stewart, Ltd.**, 730 F.2d 1197, 1204 (8th Cir. 1984). A claim is liquidated only if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness without reliance upon opinion or discretion. In this action the damage claim of plaintiff was unliquidated and plaintiff is not entitled to recover prejudgment interest.

At the conclusion of the evidence, both parties moved for directed verdicts, **see** exhibits 123 and 701. Ruling on these motions was reserved. Except as otherwise reflected in this judgment, each of said motions will be denied. Accordingly,

IT IS ORDERED that plaintiff Nucor Corporation recover from the defendant, Nebraska Public Power District, the sum of $4,403,546.70, with interest thereon at the rate of 7.02 per cent per annum as provided by law and taxable costs of this action.

IT IS FURTHER ORDERED that the parties' respective motions for directed verdict are denied.

DATED this 15th day of May, 1987.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM
UNITED STATES DISTRICT
JUDGE